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No. 02-1348

In The

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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I

THE PETITION PRESENTS NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT

Petitioner, Olympic Airways ("Olympic"), represents that the decision herein[1] has created new law in conflict with other circuits and at odds with Supreme Court precedent. As demonstrated below, the Petition lacks merit: this case creates absolutely no conflict or departure from the Supreme Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), which defines an "accident" under Article 17 of the Warsaw Convention,[2] and which the district court faithfully followed and correctly applied to the instant facts.

Petitioner next asks this Court to revisit its opinion in *Saks*, in light of its decision in *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999), using this case as a vehicle for asserting post-*Tseng* confusion in the lower courts. Yet this Court saw no reason when deciding *Tseng* to modify *Saks*, and Petitioner's transparent suggestion that the definition be narrowed in the wake of *Tseng* is unwarranted. More fundamentally, the instant case provides no basis whatsoever for reformulating the clear mandate of *Saks*, which continues to guide courts reliably and predictably in determining what constitutes an "accident" under Article 17.

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[1] 116 F. Supp.2d 1121 (N.D. Cal. Oct. 3, 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002).

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, reprinted in note following 49 U.S.C. § 40105 ("Warsaw Convention").

II

STATEMENT OF RELEVANT FACTS

Abid M. Hanson, M.D., traveled with his wife and three children (Plaintiffs/Respondents Husain) from San Francisco to Athens and Cairo during the winter holidays in 1997.[3] Because Dr. Hanson was an asthmatic, the family specifically requested nonsmoking seats. They were accommodated on all but the return flight from Athens to New York, when Olympic seated Dr. Hanson and his family just three rows ahead of the smoking section.[4]

Dr. Hanson had traveled without incident on all the flights on which he had been seated toward the middle of the aircraft, away from the smoking section. The family had specifically notified the Olympic gate agent in Cairo that Dr. Hanson had asthma, and emphasized that he could not be near smoke. From the time the Husains boarded and first discovered the location of their seats, Mrs. Husain notified an Olympic flight attendant that her husband was "allergic to smoke," and she thereafter pleaded several times with the same flight attendant to move him to a seat farther away from the smokers. But Mrs. Husain's increasingly urgent pleas fell on deaf ears.[5] Despite the fact that there were a number of nonsmoking seats available on the flight,[6] the Olympic flight attendant,

[3] *Id.*, 116 F. Supp.2d at 1124.

[4] *Id.* at 1135.

[5] *Id.* at 1124.

[6] The district court found that there were 11 empty seats, as well as 17 non-smoking seats assigned to "non-revenue passengers," who were airline employees and their relatives. *Id.* at 1126.

Maria Leptourgou, responded that the plane was "totally full," and refused to seat Dr. Hanson away from the smoky rear of the cabin or take any other action consistent with her duties.[7]

As passengers in the smoking section, both seated and standing in the aisles, filled the rear-cabin air with cigarette smoke blowing directly toward him, Dr. Hanson began to experience respiratory distress. The distress quickly progressed into a major asthmatic episode. Dr. Hanson himself moved forward to escape the smoke; after he had arrived near the front of the aircraft, his condition having visibly deteriorated, Olympic provided a seat for him. Efforts were made primarily by Dr. Hanson's travel companion, also a physician, to relieve the cigarette smoke-induced asthma attack. But these efforts were to no avail, and Dr. Hanson died from acute respiratory distress.[8]

After a bench trial, the district court made the following relevant factual findings: that the conduct of the Olympic crew, and particularly of flight attendant Maria Leptourgou, violated Olympic's own policies and procedures; that said conduct violated accepted industry standards applicable to flight attendants; and that it was consequently "aberrant behavior," both unexpected and

[7] Significant to the district court's factual findings was the "quite credible" testimony of Mrs. Husain, which was "largely corroborated" by the testimony of other eyewitnesses, and totally uncontradicted, as Ms. Leptourgou did not testify (although numerous other members of the Olympic crew did). *Id.* at n. 2.

[8] *Id.* at 1128, 1130.

unusual.[9] The district court further found that this behavior resulted in the death of Dr. Hanson, which "was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction."[10] On the evidence established, the court drew an appropriate factual inference that, "If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section [as the family had repeatedly requested], he would not have died aboard flight 417." Accordingly, the district court concluded that Dr. Hanson's death was caused by an accident, triggering liability under the Warsaw Convention.[11]

III

REASONS FOR NOT GRANTING THE PETITION

A. There is No Conflict Where the Same Rule Properly Applied to Different Facts Yields Different Results.

Petitioner complains that the courts below found an Article 17 accident under these facts, when the Third and Eleventh Circuits found – under different sets of circumstances with little factual similarity to this case – no accident. Petitioner overlooks the obvious – the circuits are not in conflict when they reach different results given different facts.

Ignoring the significant factual differences between the cases, Olympic insists that the instant case is functionally

[9] *Id.* at 1133.

[10] *Id.* at 1135.

[11] *Ibid.*

identical to *Abramson v. Japan Airlines, Co. Ltd.*, 739 F.2d 130 (3d Cir. 1984) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997). But this purported identity between the cases is a fiction designed by Petitioner solely to create the appearance of conflict – or worse, the appearance that the court has tampered with established precedent – to justify Supreme Court review.

The court below faithfully applied the rule established in *Saks*, which held that Article 17 liability "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. 392, 405. It reached a result appropriate under the particular circumstances of this case precisely because it applied the rule correctly.

When this Court in *Saks* formulated, intentionally, a *flexible* test for determining what constitutes an Article 17 accident, it wisely understood that the determination had to be a highly factual one, based on an "assessment of all the circumstances surrounding a passenger's injuries." *Ibid.* With the test established in *Saks*, this Court expressly recognized and anticipated that many different sets of facts can and would qualify as Article 17 accidents. Significantly, it approved a string of decisions in which "lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers." *Ibid.* Later, in *Tseng*, it criticized as "questionable" the Second Circuit's application of the accident test resulted in a conclusion that "mistakes" by airline personnel in carrying out security searches are not "unexpected or unusual" under *Saks*. *Tseng*, 525 U.S. at n. 9.

In addition to defining what *is* an Article 17 accident, *Saks* identifies what *is not* an accident and hence not

compensable under Article 17. This Court stated, "When the injury indisputably results from the passenger's own reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Saks.* at 406. Olympic fails to appreciate that both faces of the *Saks* coin, both the definition and the exception, call for fact-driven inquiries.

Here, the district court found on the basis of credible evidence, including expert testimony, that the misconduct of the flight crew was unusual and unexpected, abnormal, *aberrant*. The district court made a factual finding approved by the Court of Appeals that the crew's egregious departure from what is expected under industry standards and Olympic's own policies provided the link in the causal chain of events that led to Dr. Hanson's death. Under a faithful application of the test mandated by *Saks*, such facts necessarily compel the conclusion that Dr. Hanson's death was an "accident" within the meaning of Article 17 of the Warsaw Convention.

B. At the Source of the "Conflict" Described by Petitioner is Olympic's Disagreement with the Factual Findings of the District Court.

Petitioner argued in the Ninth Circuit that the district court clearly erred in not adopting Olympic's version of the facts, that Dr. Hanson died of anaphylactic shock rather than an asthmatic episode induced by cigarette smoke.[12] (Arguably, had the cause of death been a fatal allergic

[12] 316 F.3d 829 at 836.

reaction to the meal ingested without incident by other passengers, and absent notice to the flight crew of any special food requirement, no accident under *Saks* would have occurred.) The Court of Appeals found no error in the district court's factual findings and properly affirmed.

Hoping to fashion a legal issue ripe for this Court's consideration, Olympic pretends in its Petition to set aside its quarrel with the factual findings of the district court. Yet, throughout its Petition, Olympic improperly insinuates that the district court erred in its factual determination regarding the cause of Dr. Hanson's death, calling attention to the evidentiary debate below and the more difficult factual determinations the district court had to make.[13] This is wholly inappropriate in a petition for *certiorari*, because a review of those findings is not the function of this Court. Olympic's insistence notwithstanding belies the impropriety of the Petition, which seeks not clarification or guidance for the lower courts as it professes, but rather that this Court second-guess the Court of Appeals' affirmance of the district court's highly fact-driven opinion.

[13] For example, there is no reason for purposes of this Petition to review the evidence of Dr. Hanson's history with food allergies, except (improperly) to cast doubt over the district court's factual findings regarding the proximate cause of death. As the Ninth Circuit pointed out, "Whether Dr. Hanson's death was caused by a reaction to second hand smoke resulting from Ms. Leptourgou's failure to assist or by a reaction to food allergies may appear to be a close call. However, the district court, as trier of fact, was in the best position to determine which of two plausible explanations was correct." 316 F.3d 829, 839.

1. The accident here was the crew misconduct which precipitated the fatal asthma attack, not an aggravation by normal flight operation of a pre-existing condition.

The district court below made a specific factual finding that "the flight attendant's failure to transfer Dr. Hanson – or her failure to at least follow the proper procedures – *precipitated* Dr. Hanson's injury and death." 116 F. Supp.2d at 1134 (emphasis in original). Partly on the basis of this finding, the court distinguished *Abramson* and *Krys*, in which crew inaction may have *aggravated* the injuries which those passengers had suffered "as a result of entirely 'internal' forces." *Ibid.* Ignoring the court's fact distinction, Olympic continues to refer to the accident in this case as the "aggravation" of Dr. Hanson's preexisting condition.[14] Again, the results in this case were not different because the court below misapplied the law, or created new law, but because the court correctly applied the established law to significantly different facts.

2. Crew misconduct – not the existence of ambient cigarette smoke – was the "unusual, unexpected" link in the chain for which Olympic is liable under Article 17.

The district court found that while cigarette smoke played a role physically in Dr. Hanson's death, the misconduct of the Olympic crew was the "unusual or unexpected" link in the chain of causation satisfying the conditions for Article 17 liability. Again, disregarding the

[14] Petition, *Passim*.

court's findings, the Petition stubbornly refers to smoke in the cabin (not the conduct of the crew) as the link in the chain of causation identified by the district court as giving rise to Article 17 liability.[15]

Petitioner's technique of rejecting and avoiding the district court's findings in order to create factual identity between this case and *Krys* and *Abramson* is a misleading and improper strategy for invoking Supreme Court review. It is a plain attempt to create the appearance of conflict or anomaly where neither exists.

C. The Holdings in Both *Abramson* and *Krys* Expressly Apply Only in the Absence of "Abnormal" Circumstances.

Also minimized to a distorting degree in the Petition is the clear qualification prefacing the holdings in both *Abramson* and *Krys*, a qualification within which this case neatly fits. Both cases expressly held: "*In the absence of proof of abnormal external factors*, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Abramson*, 739 F.2d 130, 133, *Krys*, 119 F.3d 1515, 1520. (Emphasis added.)

In addition to finding that, unlike the injuries alleged in *Abramson* and *Krys*, Dr. Hanson's death did not result

[15] See, e.g., the Petition at p. 2: "This Petition involves the legal question whether, as a matter of treaty law, a normal condition in the aircraft cabin [smoke] which aggravates a passenger's pre-existing medical condition, can meet the 'accident' condition precedent to liability under Article 17 of the Warsaw Convention."

from an *aggravation* of injury, the court below identified numerous abnormal external factors that, when considered together pursuant to the analysis mandated by *Saks*, contributed to and supported the finding of accident. The crew misconduct was "aberrant" and in violation of industry standards and airline policies. Significantly, neither *Krys* nor *Abramson* involves a serious breach of industry standard or airline policy. To aver, as Petitioner does, that the holdings in *Krys* and *Abramson* can be stretched to shield airlines from liability for a passenger death caused in significant part by crew conduct determined by the fact finder to amount to a blatant disregard of industry standards and airline policy is, quite simply, to miss the point of both decisions.

Olympic can identify no inconsistency between the application of *Saks* in *Krys* and *Abramson* and its application in this case without seriously misconstruing the factual findings of the district court, or else distorting the holdings in those cases. To fabricate a conflict, Olympic even resorts improperly to calling this Court's attention to an unpublished decision.[16] The reason is simple: there is no hint of conflict in the circuits, only a predictable and appropriate difference in outcomes following the proper application of the rule in *Saks* to different factual scenarios.

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[16] Petition at 15, n. 10. Olympic cites an unpublished decision from the Fourth Circuit, concluding without analysis that it is consistent with *Krys* and *Abramson* and thus "also in conflict with" the decision below. Not only does Olympic fail to point out the conflict, if any, the reference is improper because the Fourth Circuit disfavors citation of unpublished decisions, which are deemed to have no precedential value. 4th CIR. R. 36.

D. Crew Misconduct that Places a Passenger Squarely in Harm's Way is Still a Link in the Chain of Causation.

Olympic asks this Court to decide whether crew misconduct can qualify as an accident under Article 17 where there is a more immediate, physical cause of injury: here, Dr. Hanson's respiratory distress triggered when a flight attendant refused to perform the duties expected of her, in violation of industry standards and airline policy. This Court has already unequivocally answered this question in the affirmative. In *Saks*, the Court stated: "Any injury is a product of a chain of causes, and we require only that the passenger be able to prove that *some link in the chain* was an unusual or unexpected event external to the passenger." *Saks*, 470 U.S. 392, 405, 105 S.Ct. 1338. (Emphasis added.)

To suggest, as Olympic does, that the physiological cause of death was not anything external to Dr. Hanson is a distortion of the causation requirement implicit in the accident definition set forth in *Saks*. That causation requirement – as stated in *Saks* and as explained by subsequent decisions – is properly applied much like a proximate cause analysis. Indeed, the court below faithfully restated without modification and followed the rule in *Saks* when it found that crew misconduct in this case was a link in the causal chain that led to Dr. Hanson's death.

E. *Tseng* Has Not Unleashed Confusion in the Lower Courts Over the Proper Application of the Rule in *Saks*.

Still insisting on a factual identity between this case, *Abramson* and *Krys*, Olympic posits that the result must have been different here because the other two cases were decided before this Court held in *Tseng* that liability against airlines for injuries caused during international air travel could not exist outside the Convention. Accordingly, Petitioner fears, district courts after *Tseng* will attempt to compensate plaintiffs by expanding the definition of "accident". Petition at 20.

Since *Tseng*, litigants have indeed switched sides[17] in arguing for or against a finding of Article 17 accident in a specific case: defendant airlines prior to *Tseng* sought the protections of the Convention from the common law liability claims and hence urged a broader definition, while plaintiffs sought to avoid the reach of Article 17 and attendant recovery limitations, particularly when compensation for Warsaw injuries was limited in most cases to $75,000.[18] However, although cases finding no accident

[17] For example, in *Krys*, the defendant airline argued for a finding of "accident" under the Warsaw Convention in order to avoid, on preemption grounds, a large jury award based on a state law claim.

[18] The fact that many airlines have voluntarily lifted the $75,000 liability limitation by signing the IATA Accords is further reason for airlines to try to narrow the definition of accident under Article 17 . See International Air Transport Association Intercarrier Agreement on Passenger Liability, approved by D.O.T. Order 96-11-6 (D.O.T. Nov. 12, 1996). Arguably, the promulgation of the Accords has had an even greater effect than any court decision on the reversal of the airlines' position on "accident".

before *Tseng* applied *Saks* under circumstances which still allowed resort to state law, a possibility which *Tseng* has eliminated, Petitioner can cite to no evidence that *Tseng* has altered the way in which district courts are applying the resilient accident definition established in *Saks*. Courts are reaching results that differ according to the facts presented to them precisely because they are doing what this Court mandated in *Saks*: assessing all of the factual circumstances of the injury in determining whether the conditions for compensation under Article 17 have been met. Petitioner's prognostication that district courts will disregard the mandate of *Saks* in order to maximize plaintiffs' recovery is unfounded and, indeed, belies an alarming lack of confidence in the district courts to continue to faithfully follow Supreme Court precedent.

IV

CONCLUSION

Petitioner is asking not for guidance but for a narrowing of the definition of "accident" established by this Court in *Saks*. There is no reason for the Court to modify *Saks*, and certainly none raised by this case. Because the instant case plainly creates no conflict or departure whatsoever, the true basis of the Petition is Olympic's dissatisfaction with the district court's application of the law to a particular set of facts with which Petitioner disagrees. Consequently, the Petition presents no issue worthy of consideration by this Court, and must therefore be denied.

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